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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-994

EL PASO NATURAL GAS COMPANY,
*Petitioner,*

v.

STATE OF ARIZONA, et al.,
*Respondents.*

On Petition for Writ of Certiorari
To the Supreme Court of Arizona

## PETITIONER'S REPLY MEMORANDUM

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Petitioner seeks relief in this Court from a decision of the Supreme Court of Arizona which deprived it of its property without due process of law. The property consists of approximately $1 million of *ad valorem* taxes, collected to fund appropriations that violated the state constitution. Although the question had not been briefed or argued in the trial court, the Arizona

Supreme Court held that, under the doctrine of virtual representation, an adverse decision against another taxpayer concerning the same tax was res judicata against Petitioner, even though the court decided, at the same time, that the decision against the other taxpayer was wrong.

In a strange response which does not even mention virtual representation, or dispute that Petitioner was deprived of due process in its attack on an unconstitutional tax, the Respondents state that the question presented for review is whether this Court has jurisdiction where the Petitioner does not claim its right under the Constitution or laws of the United States, and where the state supreme court affirmed the judgment under the state law doctrine of res judicata or stare decisis.

The petition is very specific in its statement of a claim under the Constitution of the United States. Petitioner's constitutionally guaranteed right to procedural due process was violated when the Arizona Supreme Court held that the decision in *State* v. *Arizona Public Service Co.,* 24 Ariz. App. 601, 540 P.2d 727 (1975), *appeal dismissed,* 426 U.S. 931 (1976) (hereafter *APSCO*), was res judicata as to Petitioner's claim for a tax refund. Petitioner did not, as asserted by Respondents, rely solely on *Hansberry* v. *Lee,* 311 U.S. 32 (1940), to establish this proposition, although that case alone is sufficient. Petitioner also cited numerous other authorities to the same effect. These authorities are not distinguishable, and Respondents have not attempted to distinguish them.

While Petitioner's constitutional claim is therefore clearly stated, the Respondents challenge this Court's



jurisdiction to hear the case because of the manner in which the claim arose. The Respondents correctly note that Petitioner did not set up a claim under the United States Constitution in the trial court, and that Petitioner does not claim that the decision of the trial court violated its constitutional rights. They then cite cases for the proposition that due process does not require that a state offer a right of appeal, provided that due process was accorded in the trial court. The thrust of the Respondents' argument is that this Court is therefore powerless to review the decision of the Arizona Supreme Court, regardless of whether or not that court violated Petitioner's constitutional rights.

The cases cited by Respondents are irrelevant because they deal only with the question of whether due process requires that a right of appeal be offered. The relevant question is whether, where an appeal is taken under state law, the denial of a party's due process rights by the state appellate court may serve as the basis for this Court's exercise of its power of review.

As to that issue, this Court has expressly held that it has jurisdiction to review the decisions of state supreme courts where, as here, the federal constitutional issue was first created by the resolution of the appeal by the supreme court. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930); *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U.S. 313 (1930); *Saunders* v. *Shaw,* 244 U.S. 317 (1917). *Cf. Cole* v. *Arkansas,* 333 U.S. 196 (1948); *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932).

The fact that the Arizona Supreme Court's decision was based upon the state law doctrine of res judicata is also irrelevant. It was an application of Illinois' doctrine by the courts of that state that this Court, in *Hansberry,* held violative of due process.

The Respondents' other challenge to this Court's jurisdiction is based upon their suggestion that the decision of the Supreme Court of Arizona was based upon an application of the doctrine of stare decisis, although the court's opinion (Appendix A) clearly states that the holding is based upon res judicata. Apparently the Respondents are unable to distinguish between these two doctrines.

The doctrines are distinguishable, and the distinction is critical to the question of this Court's jurisdiction.

The court below did state that it was prospectively overruling its prior decision in *Cochise County* v. *Southern Pacific Co.*, 99 Ariz. 385, 409 P.2d 549 (1966), but refrained from saying that it was prospectively overruling *APSCO* as well. However, since the Arizona Court of Appeals held in *APSCO* that the taxpayer must allege that the tax rate was excessive, based entirely on the *Cochise County* opinion, the Respondents can argue that *APSCO* was also only prospectively overruled. If so the supreme court could have decided Petitioner's appeal on the basis of the rule of *APSCO,* treating the *APSCO* decision as stare decisis, instead of treating it as res judicata of Petitioner's claim, and such an application of stare decisis to Petitioner's case would not have violated the Due Process Clause.

But the supreme court did not decide Petitioner's appeal in this manner. If it had, it would have been



required to consider Petitioner's appeal from the judgment of the trial court on the merits, merely using *APSCO* to establish, as stare decisis, that Petitioner had to allege and prove that the tax rate was excessive. As Petitioner amended its complaint to make that allegation, its appeal could not have been disposed of on procedural grounds, and the supreme court would then have been confronted with the trial court's patently absurd holding that an unconstitutional appropriation which increased the state tax rate from $.54 to $1.65 per $100 assessed valuation and increased the Petitioner's taxes by $1 million was not "excessive."

Instead, the court completely ignored the merits of Petitioner's appeal and the findings of fact and conclusions of law of the trial court. The court held that, under the doctrine of virtual representation, Petitioner had in effect been a party to *APSCO,* and that Petitioner was therefore barred, under the doctrine of res judicata, from litigating any matters which were or could have been raised in the *APSCO* case. This holding can only be explained as an application of the doctrine of res judicata, and not, as suggested by Respondents, stare decisis.

This distinction, between binding a party to a rule of law established by an earlier decision under the doctrine of stare decisis as opposed to absolutely barring a party from litigating its claim under the doctrine of res judicata, was recently recognized and applied by this Court in *United States* v. *Maine,* 420 U.S. 515, 527 (1975). In that case, which was a suit by the government against several Atlantic seaboard states to establish the federal government's rights in the seabed, this Court considered the binding effect which should be given to its earlier decisions in similar cases

against other states. The Court held that those decisions could only be used for their stare decisis effect, and not for preclusion under the doctrine of res judicata, because the Atlantic seaboard states had not been parties to the prior decisions. This holding left the states free to argue that the Court should overrule its earlier decisions, and permitted the states to raise new legal and factual matters which had not been decided in the earlier decisions. Petitioner is similarly entitled, under the Due Process Clause, to have its appeal decided on the merits.

In conclusion, this Court has jurisdiction under 28 U.S.C. § 1257(3) to review the decision of the Supreme Court of Arizona because Petitioner has claimed a right under the Constitution of the United States: its right not to be precluded by a judgment to which it was neither a party nor virtually represented by a party.

The Respondents have, by their silence, conceded the validity of Petitioner's other arguments, including the point that this decision is representative of a recent trend in the states to similarly deny the constitutional rights of taxpayers. Accordingly, a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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